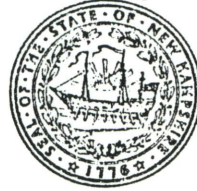


The State of New Hampshire

Opinion

original material
in 49.13



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Concord

June 24, 1975

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The Honorable L. Waldo Bigelow
Roslyn Avenue
Warner, New Hampshire

Dear Mr. Bigelow:

By letter dated January 4, 1974, your Commission inquired whether under the provisions of RSA 235 a road to public waters can legally be laid out to provide public access to Pleasant Pond in the Town of Deerfield without contravening the provisions of RSA 235:7 and Chapter 458 of 1965 Laws of New Hampshire. In our opinion, such access can be laid out under certain circumstances.

Under the provisions of RSA 235:1, 2, the Governor and Council may appoint a Commission of three persons to determine, after hearing, "... whether there is occasion for the laying out of a highway from any existing highway to any public water in this state. . . ." It is our understanding that on September 19, 1972, the Governor and Council appointed L. Waldo Bigelow, Edward H. York, and James N. Yannekis as a Commission to hold a hearing on a petition for public access to Pleasant Pond. Mr. Richard Flynn was subsequently appointed to replace Mr. Yannekis. The Commission held a hearing on May 19, 1973.

Public water is defined in RSA 271:20 as follows:

All natural bodies of fresh water having an area of twenty acres or more are public waters, and are held in trust by the State for public use; . . .

We have assumed for the purposes of this opinion that Pleasant Pond meets the area requirement of RSA 271:20 and therefore is a public water as defined in that statute.

With only one exception, a highway to public water can be laid out upon determination by the Commission that there is "occasion" for the laying out of such a highway. RSA 235:1, 2. The sole exception to

The Honorable L. Waldo Bigelow
Page Two
June 24, 1975

this statutory authority is set forth in RSA 235:7 which provides that

[n]o highway shall be laid out under the provisions of this chapter to any public waters used by any city or town for reservoir purposes.


In 1965, the Legislature passed the following law relating to Pleasant Pond:

The Town of Deerfield is authorized to enter upon and take water from Pleasant Pond, a great pond, situated in the Town of Deerfield for purposes of obtaining a public water supply for the town, upon compliance with the general laws relating to municipal water systems. 1965 Laws, Chapter 458.

Since, as we have assumed under the provisions of RSA 271:20, Pleasant Pond is a public water held in trust by the State for public use, the Legislature, by enacting Chapter 458, granted the Town of Deerfield a right which it otherwise would not have had, namely, the right to use Pleasant Pond for a water supply. This grant was not absolute, but was explicitly made conditional ". . . upon compliance with the general laws relating to municipal water system." These general laws provide in part that construction plans for any water system must be approved by the Division of Public Health Services (RSA 148:25, I), and that chlorination or other disinfection facilities must be installed (RSA 148:24-a). In addition, fishing, boating and swimming are subject to regulation. (RSA 148:6, 7 [supp]).

It is our opinion that the mere granting by the Legislature of a conditional right to the Town of Deerfield to use Pleasant Pond as a public water supply does not in and of itself mean that Pleasant Pond is being "used" for reservoir purposes under RSA 235:7. The Town has the right to use Pleasant Pond for reservoir purposes only under certain conditions. Your Commission must initially determine whether or not the Town is presently using the Pond for reservoir purposes in accordance with the conditions imposed by Chapter 458 of the Laws of 1965. Absent present use in compliance with those conditions, it is our opinion that your Commission has the authority to lay out a highway from any existing highway to Pleasant Pond upon the Commission's determination that there is "occasion" for the laying out of such a highway.

Sincerely,


Warren B. Rudman
Attorney General


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Assistant Attorney General